

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

William F. Hinkel
Executive Analyst

Ruth Ann Burke
Board Clerk

January 19, 2021

SENT VIA ELECTRONIC MAIL ONLY

Natural Resources Council of Maine
James Kilbreth, Esq.
jkilbreth@dwmlaw.com

**Re: NRCM Appeal of Central Maine Power Company, NECEC Transmission LLC
Department Order, Partial Transfer – Receipt of appeal; proposed supplemental
evidence; and stay request**

Dear Mr. Kilbreth:

On January 4, 2021, the Natural Resources Council of Maine (NRCM) filed with the Board of Environmental Protection (Board) a request to vacate the December 4, 2020, Order of the Commissioner of the Department of Environmental Protection (Commissioner) (L-27625-26-K-T) (Transfer Order) approving the partial transfer of the New England Clean Energy Connect (NECEC) permit. The Transfer Order conditionally approved the application of Central Maine Power Company (CMP) and NECEC Transmission LLC to partially transfer to NECEC Transmission LLC the May 11, 2020, Order of the Commissioner conditionally approving the application of CMP to construct the New England Clean Energy Connect project (NECEC Order). Three appeals of the underlying NECEC Order (Department Order #L-27625-26-A-N/L-27625-TG-B-N/L-27625-2C-C-N/L-27625-VP-D-N/L-27625-IW-E-N) were filed by NRCM, NextEra Energy Resources, LLC, and the West Forks Group and are pending before the Board.¹

Although NRCM's January 4, 2021, filing is styled as a request to vacate the Transfer Order, NRCM alternatively requests that its filing be considered an appeal. NRCM also requests a hearing on the appeal and a stay of the Transfer Order during the pendency before the Board of the underlying appeals of the NECEC Order.

Department rule Chapter 2, *Rule Concerning the Processing of Applications and Other Administrative Matters*, § 24 governs the process for Board appeals of Department of Environmental Protection

¹ West Forks Group is comprised of persons who intervened in the Department licensing proceeding and who are now represented by Elizabeth A. Boepple, Esq., BCM Environmental & Land Law, PLLC. Appellants in the West Forks Group are: West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Matt Wagner, Mike Pilsbury, Mandy Farrer, and Carrie Carpenter.

(Department) licensing decisions. The Board's authority to vacate a Commissioner licensing decision lies within the context of an appeal, which includes the consideration of a response from the licensee and any respondents, and oral arguments at a Board meeting. Therefore, the Board accepts NRCM's filing as a timely appeal of the Transfer Order. This letter acknowledges receipt of that appeal and provides notice of the filing of the appeal to persons on the Department's list of interested persons associated with the Transfer Order and the Board's service list in the pending appeals of the NECEC Order. A copy of NRCM's appeal of the Transfer Order, excluding its associated exhibits, is attached. A copy of the full appeal including all exhibits is available for download at <https://www.maine.gov/dep/bep/featured.html>.

Review for proposed supplemental evidence

NRCM proffers Exhibit 1: 2014 Lease Between Bureau of Parks and Lands and CMP, and Exhibit 2: May 3, 2019, Certificate of Public Convenience and Necessity, as supplemental evidence. However, the Department staff has confirmed that Exhibits 1 and 2 are already in the Department's underlying administrative record for the NECEC Order, which was considered by the Department in the processing of the Transfer Order. NRCM's appeal contains no other proposed supplemental evidence.

In accordance with Chapter 2, § 24(C)(1)(a), the licensee's and any respondents' response to the merits of the appeal must be filed **by 5:00 p.m. on February 18, 2021**. Filings may be submitted by electronic mail provided the signed original document is received by the Board within three working days of the filing deadline. All filings must be copied to the draft service list (attached).² Filings with the Board must be directed to:

Mark C. Draper, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017
ruth.a.burke@maine.gov

Request to consolidate appeals

NRCM argues that this appeal should be consolidated for processing with the three pending appeals of the underlying NECEC Order because the Transfer Order "is inextricable from the underlying [NECEC Order]." NRCM appeal, p. 2. The Transfer Order and the NECEC Order, although discrete final agency actions addressing different issues and standards, are based in substantial part on the same administrative record.³ For administrative economy and consistency, the Board will consolidate and process NRCM's appeal of the Transfer Order together with the three underlying appeals of the NECEC Order.

² The Board is currently utilizing the service list in the matter of the appeals of the NECEC Order (as revised on October 19, 2020) as the draft service list in the appeal of the Transfer Order. The Transfer Order service list will be finalized in consideration of responses to the merits of the appeal received by the filing deadline.

³ The administrative record considered for the Transfer Order includes the Department's administrative record for the underlying NECEC Order plus records related to the filing and processing of CMP's and NECEC Transmission LLC's application for the Transfer Order.

Request to stay the Transfer Order

NRCM also requests that the Board stay the Transfer Order during the pendency of the appeal before the Board. For background and context, it is important to note that the Commissioner has already ruled on requests for a stay of the underlying NECEC Order. On August 26, 2020, the Commissioner denied NRCM's and the West Fork Group's petitions, dated June 10, 2020, and June 5, 2020, respectively, to stay the NECEC Order. In doing so, then Commissioner Reid concluded that NRCM and the West Forks Group had not made the showings necessary to justify a stay of the NECEC Order. In response to NRCM's renewed request to stay the NECEC Order, on October 23, 2020, I declined to revisit and reconsider the Commissioner's August 26, 2020, stay decision. On November 2, 2020, NRCM filed with the Kennebec County Superior Court a motion to stay the NECEC Order. That motion for a judicial stay is still pending before the Superior Court, *Docket No. KEN-AP-20-27*.

The criteria for obtaining a stay of an agency's decision during an appeal are set forth in the Maine Administrative Procedure Act, 5 M.R.S § 11004. The filing of an appeal does not operate to stay a license issued by the Department. A petitioner seeking a stay (here NRCM) bears the burden of demonstrating that: (1) the failure to obtain a stay will result in irreparable harm to the petitioners, (2) there is a strong likelihood of success on the merits on the petitioner's appeal, and (3) the issuance of a stay will result in no substantial harm to adverse parties or the general public. A petitioner must satisfy all three parts of this test to obtain a stay.

The NRCM's stay request is perfunctorily made and is devoid of any argument as to why the Board should grant a stay of the Transfer Order and addresses none of the three criteria that must be established by NRCM for the Board to grant a stay. NRCM has failed to meet its burden to demonstrate that criteria to obtain a stay are met, and consequently, the NRCM's stay request is denied.

If you have any questions, you may contact Board Executive Analyst William F. Hinkel at bill.hinkel@maine.gov (207) 314-1458 or Assistant Attorney General Peggy Bensinger at peggy.bensinger@maine.gov (207) 626-8578.

Respectfully,



Mark C. Draper, Chair
Board of Environmental Protection

Attachment: Draft service list

cc: NECEC Order Service List (rev. October 19, 2020) (via e-mail only)
Transfer Order Interested Persons List (via GovDelivery)

Board of Environmental Protection
Appeal of CMP - NECEC License
(L-27625-26-A-N, L-27625-TG-B-N, L-27625-2C-C-N,
L-27625-VP-D-N, L-27625-IW-E-N)
Service List, rev. October 19, 2020

BEP

**Unless otherwise specified, all filings
are due by 5:00 p.m. to Mark C.
Draper c/o Ruth Ann Burke**

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Appellants

Natural Resources Council of Maine

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West Forks Plantation,

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Kennebec River Anglers,

Maine Guide Service, LLC,

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Mike Pilsbury,

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Licensee

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Service List, rev. October 19, 2020

Respondents (cont'd)

City of Lewiston,
Maine Chamber of Commerce,
Lewiston Auburn Metropolitan Chamber
of Commerce

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